No. 2751

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

MARYLAND CASUALTY COMPANY of Baltimore, Maryland, a corporation,

Plaintiff in Error,

VS.

ORCHARD LAND & TIMBER COMPANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the District Court of the United States, for the District of Oregon.

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STATEMENT OF THE CASE

The statement of the case contained in the brief of plaintiff in error, is correct as far as it goes, but in addition to what is therein contained, it should be stated that at the trial the plaintiff introduced in evidence the note described in the complaint, which was marked Exhibit "A,"

and a certified copy of the records of Lane County, Oregon, showing satisfaction of the judgment against the plaintiff, which was marked Exhibit "B." Thereupon the plaintiff rested. No motion for judgment was then, or at any time made by the defendant, and nothing was done by the defendant except to call as its witness, Charles A. Hardy. After taking the testimony of that witness, the case was submitted to the court, and thereafter the court rendered an opinion to the effect that the plaintiff was entitled to recover the full amount covered by the policy (p. 42 Trs.), and thereafter made and entered a general finding accordingly, upon which the judgment was entered from which this writ of error is prosecuted. No exceptions were saved by the defendant, to any of the rulings during the progress of the trial.

ARGUMENT

POINT I.

The case having been tried without a jury, the findings being general, and no rulings during the progress of the trial having been excepted to, there is nothing for this court to review.

Sections 649, 700, Revised Statutes.

Norris v. Jackson, 9 Wallace, 125, 128; 19 L. Ed. 603;

Mason v. Smith, 191 Fed. 502;

J. W. Paxson Co. v. Board, 201 Fed. 656;

National Surety Co. v. Cincinnati Etc. Co., 145 Fed. 34;

Barnard v. Randle, 110 Fed. 906;

Fitzgerald et al v. Bossford, 142 Fed. 134;

Keeley v. Company, 169 Fed. 598;

Continental etc. Bank of Chicago v. Cobb, 200 Fed. 511.

POINT II.

The giving of the promissory note and the satisfaction of the judgment, constituted payment of the judgment, against plaintiff, and therefore a loss under the terms of the policy.

Kennedy v. Fidelity etc. Co. (Minn.), 110 N. W. 97; 9 L. R. A. (N. S.) 478;

Gardner v. Cooper (Kans.), 58 Pac. 230;

Seattle etc. Co. v. Maryland Casualty Co. (Wash.), 96 Pac. 509; 18 L. R. A. (N. S.) 121;

Taxicab Motor Co. v. Pacific Coast Casualty Co. (Wash.), 132 Pac. 393.

POINT III.

Bad faith, collusion or fraud to be available, as a defense, must be pleaded.

Springer v. Jenkins, 47 Or. 506.

Buchtel v. Evans, 21 Or. 309.

Jamieson v. Coldwell, 23 Or. 144.

THE SCOPE OF THE REVIEW

It was early decided by the Supreme Court of the United States, in the case of Norris v. Jackson, supra, that where a civil case is tried before the court without a jury, two kinds of findings are provided for, namely; general and special, and that,

> "If the verdict be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions, or as may arise on the pleadings."

This case has been followed in many subsequent decisions of the Supreme Court. See page 503, of the opinion in Mason v. Smith, 191 Fed. Thus in J. W. Paxson Company v. Board, supra, Sections 649 and 700 of the Revised Sta-

tutes are quoted and construed. Here the trial court rendered an opinion (which is set out in full), in accordance with which the judgment was entered, whereupon a bill of exceptions was allowed, the exceptions being to the alleged findings of fact, the findings being challenged as unsupported by the evidence. After quoting the statutes above mentioned, the court says, on page 660:

> "We are of the opinion that the finding of the court was general and not special, and therefore like the verdict of a jury is not reviewable by this court. No request was made for special findings, and unless some other request, or motion equivalent to a motion for peremptory instructions or judgment non obstante veredicto was made, with proper exception to the refusal thereof, the findings of fact cannot be the subject of assignments of error."

If it is argued that there is no evidence to support the judgment, and that this can be raised by way of assignment of error in this court, then a complete answer to that argument is found in Keeley et al v. Company, supra. Here the court made a general finding upon which judgment was rendered; error was assigned on the ground that there was no evidence to support the judgment, concerning which the court says:

> "This is a question of law, one upon which the trial court was not asked to pass, and upon which it never did pass. As this is a court which, in actions at law, can only correct errors committed by the trial court, there appears to be nothing for our consideration."

The court then quotes section 700, and the following from the case of Cooper v. Omohundro, 19 Wallace 65, where the issues of fact were submitted to the Circuit Court, and the finding is general: "Nothing is open to review, . . . except the rulings of the circuit court in the progress of the trial, and the phrase 'rulings of the court in the progress

of the trial' does not include the general finding of the circuit court nor the conclusions of the circuit court embodied in such general finding." Several cases are then cited, and the opinion continues: "The question of law whether on all of the proofs the judgment can be sustained is not self-assertive. It commands consideration only when raised by some appropriate motion and on due exception taken to an adverse ruling thereon by the court."

We deem it unnecessary to quote further from the decisions on this point, as the rule is sustained by so many decisions, while we have not been able to find a case the other way. The court will bear in mind that not a single ruling of the trial court was objected to, and not a single motion of any kind was made by the defendant, nor was there any request made for either general or special findings, so that the matters sought to be presented in this court, were in no manner presented to the trial court, except by a motion for a new trial, for which, of course, there was no basis in the record. It seems to us that there is nothing here for review, and that therefore it is scarcely necessary to consider any of the other features of the case. However, we will briefly discuss the question of payment of the judgment, which involves a further question of whether or not the plaintiff has suffered loss under the terms of the policy from liability imposed by law.

THE LOSS SUFFERED BY PLAINTIFF

The plaintiff was insured by the defendant against accidents to employees of plaintiff. Dunn, an employe of the plaintiff, suffered an injury while the policy was in force, in consequence of which he recovered judgment against the plaintiff for more than the amount of the policy. The defendant under the terms of the policy, took charge of the

litigation, but at the end thereof refused to pay any part of the judgment. Dunn then issued execution upon the judgment and sought to garnish the defendant, but these proceedings were dismissed. Thereupon Dunn made settlement of his claim against the plaintiff, by accepting the plaintiff's promissory note, payable in ninety days, for the full amount of the judgment, and satisfied his judgment of record. The plaintiff then commenced this action to recover under the policy, claiming that it had paid the judgment. The answer raised the issue of payment and the accrual of any loss, but in no manner pleaded bad faith, collusion or fraud between the plaintiff and Dunn. Nor was there any evidence offered in support of any such defense. It would seem therefore that the sole question upon this phase of the case is one of law, namely; whether or not the execution, delivery and acceptance of the promissory note, and the satisfaction of the judgment obtained by an employee against the assured, is a loss within the meaning of the terms of the policy. This question has been passed upon by the courts several times, and some of the leading cases are cited in this brief. In the Kennedy case, supra, decided by the Minnesota Supreme Court, the language of the policy was that no action should be brought except "by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment." An employee of the plaintiff having been injured, obtained a judgment against the insured, which was satisfied upon the delivery by the insured of four promissory notes covering the amount of the judgment, payable to the employee. And thereupon an action was brought against the insurance company. The identical question sought to be raised in this case was here considered. We can do no better than to quote the following from the opinion of the court:

"The contract contemplates that an actual loss shall

be sustained and paid before the company becomes liable, and appellant submits that by the fair and reasonable meaning of the language the assured cannot accomplish payment or satisfaction of the judgment in any other way than by actually parting with the cash. It is admitted that the debt and judgment was paid and satisfied by the execution of the promissory notes, if given in good faith. But the whole argument of appellant rests upon the claim that the mere giving of notes did not amount to a loss actually sustained, for the reason that the maker of the notes, and the guarantor may never be called upon to make payment, might become insolvent, that there is no certainty that they will ever be paid, and, if not paid, there is no loss actually sustained, . . . Fairly construed, the language means simply that the judgment must be paid and satisfied within sixty days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment.

"If the assured accomplished the satisfaction and payment of the judgment by executing and delivering the promissory notes above described, the good faith of that transaction was hardly open to question, even thought it gave the assured the advantage of collecting from appellant company the amount of insurance before the notes came due. So far as the record shows, the assured paid the judgment in good commercial paper, and there is nothing upon the face of the transaction to indicate that the arrangement was made for a fraudulent purpose."

The Washington case of Seattle etc. Company v. Mary-

land Casualty Company, supra, is squarely in point. It was brought against the plaintiff in error in the case at bar, upon a policy similar in its language to the policy under consideration, and the precise question sought to be reviewed here was there decided. The assured had delivered a note to cover the judgment, which was satisfied. It was argued that there was no loss under the policy, which was answered as follows:

> "The argument is made that there is no loss within the meaning of the above until cash has been actually paid in satisfaction of the judgment, . . . The execution of a note in exchange for satisfaction is, in legal effect, equivalent to the exchange of property therefor. It confers a right to invoke legal process, to sieze and levy upon property in value equal to the amount of the note."

The court cites with approval, the case of Bausman v. Credit Guaranty Company (Minn.), 50 N. W. 496, referred to in the Kennedy case, and also the case of Gardner v. Cooper, supra, and other cases, and quotes the note to the Kennedy case found in 9 L. R. A. (N. S.) 478, as follows:

> "The conclusion reached in the above case, that the giving of a note amounts to a loss actually sustained by the person indemnified within the meaning of a contract of indemnity, where the note is accepted by the creditor as actual payment and satisfaction of the original debt, has the sanction of all the authorities."

In Taxicab Motor Company, supra, the defendant had insured the plaintiff "against all loss or expense resulting from claims upon the assured, for damages on account of bodily injuries, or death accidentally suffered," by the employees of the plaintiff." And it also contained the following:

> "No action shall lie against the company for any loss under this policy unless it shall be brought by the

assured to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment, etc."

One of the employees of the plaintiff having been killed his administratrix brought an action against the plaintiff and secured a judgment, which the insurance company refused to pay. The plaintiff thereupon procured a satisfaction of the judgment by executing and delivering to the administratrix, its promissory notes for the amount thereof. In this case the insurance company raised the issue of good faith in the transaction. A settlement was made under the authority of the probate court, but that does not alter the principle involved in any manner; and in answer to the argument advanced by the insurance company, the court said:

> "It is no answer to say that the note may never be paid at all, or that it may be compromised and settled for less than its full amount after the assured is reimbursed by the surety company. This can happen no matter how the note is paid. Had the assured paid the judgment in cash out of its own funds, or paid it in money borrowed from another, there could be a secret agreement to repay it, or some part of it, to the assured after the collection is made from the insurance company. But this is beside the question. The real question is, is there such an agreement? And before this question can be answered affirmatively, there must be some satisfactory evidence to that effect. In this record, as as we say, there is no such evidence."

It seems to us that no language could be more pertinent to the case at bar than that found in these cases. When the defendant merely alleged that the judgment had not been paid, it evidently considered that the only question involved was whether or not payment could be made, of the loss sustained by the assured by the giving of a promissory note. The cases referred to in the brief of the plaintiff in error, and bearing upon the question of whether or not the

giving of a promissory note is payment, are not in point, for two reasons: First, under some circumstances a promissory note, when tendered as evidence of payment of a debt, as well as a receipt, may be shown not to be a payment of the debt or obligation; and, second, the production in evidence of a promissory note or receipt, is prima facie evidence of payment. In this case there is something more than a promissory note or receipt. There is a satisfaction of an employee's claim and judgment in such a way as to absolutely extinguish it. Dunn himself has certified upon the records of Lane County, that the judgment is paid. He is certainly estopped from insisting at any future date that the judgment is not satisfied. But assuming for the sake of the argument that he could show that he did not accept the note in satisfaction of the judgment, and that the entry upon the records does not mean what it purports to mean, and that the judgment is still alive, because the whole transaction was merely colorable and collusive, nevertheless the court cannot draw that inference from this record because the defendant offered no evidence in support thereof and did not plead it. The argument that the assured and the employe have resorted to this method of collecting from the insurance company, amounts to no more than to say that they have resorted to a legal remedy available to them.

We submit that, beyond the technical rules of law in a case of this kind, there is a rule of common justice which requires that the insurance company shall comply with the terms of its policy and liquidate this claim. It accepted the premium of $140.00 from the plaintiff in this case. A loss accrued. Everything contemplated in the contract of insurance requisite to fix liability upon the insurance company has occurred, and the company should pay the loss.

The case of Cranston v. Company, 63 Ore. 427, is cited by plaintiff in error. This was an action by the beneficiary

under a life insurance policy against the insurance company, and the defense in part was that the premium had never been paid, it appearing that the assured had given a promissory note for the premium but had not paid the note.

The whole substance of the case is that the agreement between the insured and the company was, that before any liability should attach under the policy, the promissory note must be paid, which of course, at once shows that this case has no relevancy to this discussion. If the agreement between Dunn and the plaintiff here, had been that the judgment should be satisfied when the note was paid, and not until then, the case cited would be in point; but here the note was accepted as payment and the judgment satisfied. Nor is the Leschen case, 173 Fed. 855, cited by plaintiff in error in point. The question there was, whether or not the giving of a note for a certain amount was intended by the parties as payment, the court putting it this way:

> "Does this agreement evidence the intention of the parties to it that the title to this property should pass to the vendee when the latter gave its 60-day note? The purpose of all interpretation is to ascertain and to give effect to the intentions of the parties expressed by their writings."

The court found after considering the facts and the writings, that the parties did not intend that the note should operate as a payment. The satisfaction of a judgment was not involved in this case, and whether the acceptance of a promissory note is payment or not, of an obligation, the release of a judgment on account of which the note is given, certainly extinguishes the obligation, and no other inference can be drawn from the action of the parties. Without consuming more space in a discussion of the authorities relied upon by the plaintiff in error, we submit that each and everyone of them will be found, upon examination to be

clearly distinguishable from the case at bar, and no authority for the argument advanced by counsel.

BAD FAITH, COLLUSION AND FRAUD TO BE AVAILABLE, AS A DEFENSE MUST BE PLEADED.

Section 73, L. O. L., is to the effect that the answer must contain general or specific denial of each material allegation of the complaint controverted by the defendant, and may contain a statement of any new matter constituting a defense. This section has been many times construed, and it has been uniformly held that, as the defendant can only prove such facts under the denials as go to disprove the plaintiff's cause of action, if he intends to rest his defense upon any other matter, such as payment, estoppel, fraud, illegality of consideration, etc., he must plead the facts constituting such defense. See Springer v. Jenkins, 47 Ore. 506, and cases there cited. This construction of the statute has never been departed from. The defendant therefore could not have introduced any evidence in support of its claim now made, of bad faith, or collusion. But as this defense was neither pleaded, nor in any way brought before the court, it is needless to discuss it.

We respectfully submit that the judgment should be affirmed.

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